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The Ideological Consequences of Selection: A Nationwide Study of the Methods of Selecting Judges

Brian T. Fitzpatrick

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The Ideological Consequences of
Selection:
A Nationwide Study of the Methods of
Selecting Judges

Brian T. Fitzpatrick*

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INTRODUCTION

How best to select judges has been the subject of great debate ever since the founding of the United States. Over the course of American history, four basic methods of selection have been tried (with some variations among them): appointment by elected officials, partisan election, nonpartisan election, and selection by a technocratic

* Professor of Law, Vanderbilt Law School. My thanks to Alan Tarr and Stephen Ware for helpful comments on prior drafts of this Article. This study would not have been possible without the generous financial support of the Searle Freedom Trust, nor without the assistance of a legion of research assistants at Vanderbilt Law School: Sean Atkins, Brigham Dixon, Matthew Ginther, Ricky Hutchens, Ryan Loofbourrow, Kate Maxson, Cameron Norris, Lauren Smith, and Ben Warshaw. I am very grateful to the Trust and to each of these research assistants for their assistance.

commission.¹ The first three methods will be familiar to most readers: gubernatorial or legislative appointment of judges, contested elections with party affiliation on the ballot, and contested elections without party affiliation on the ballot. But readers may be less familiar with the last method: many states today use unelected commissions often comprised largely of lawyers selected by the state bar to nominate judges to the governor, who must appoint one of the commission's nominees; in many of these states, the judges later run for retention only in a yes-no referendum with no opponent.² Commentators and scholars have long debated which of these methods creates judiciaries with, for example, the greatest technical capabilities, the most independence and accountability, and the widest demographic diversity.³

Until an article I published in the *Missouri Law Review* a few years ago,⁴ however, scholars had never asked whether there are any ideological consequences to employing one selection method versus another. Might one method lead to judges who are more liberal or more conservative than other methods? Might this then lead to decisions from those courts that are more liberal or conservative than decisions from courts selected by different methods? In my *Missouri Law Review* piece, I hypothesized that one of these methods—selection by a technocratic commission—might very well create judiciaries that are systematically more liberal than the others.⁵ I gave two reasons for this hypothesis. First, in many states that use the commission method (also called the “Missouri Plan,” after the first state to adopt it, or “merit selection,” as its proponents like to refer to it), lawyers’ organizations have control (or at least outsized influence) over the commissions.⁶

1. See, e.g., *Methods of Judicial Selection: Selection of Judges*, NAT'L CTR. FOR ST. CTS., http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm (last visited Oct. 5, 2017) [<https://perma.cc/Y5VT-Y2A9>] [hereinafter *Methods of Judicial Selection*] (listing information on each state's current method for selecting judges compiled by the American Judicature Society). At the time of the founding, every state selected its judges through executive or legislative appointment. See Brian T. Fitzpatrick, *The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure*, 98 VA. L. REV. 839, 855–58 (2012). By the time of the Civil War, however, the vast majority of states had changed their method of judicial selection to election by the people. See *id.* at 859–60. Technocratic commissions became popular in the twentieth century. See Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 MO. L. REV. 675, 677–78 (2009) [hereinafter Fitzpatrick, *Merit Selection*].

2. See Fitzpatrick, *Merit Selection*, *supra* note 1, at 677–84.

3. See, e.g., Brian T. Fitzpatrick, *Errors, Omissions, and the Tennessee Plan*, 39 U. MEM. L. REV. 85, 115–23 (2008) (reciting studies).

4. Fitzpatrick, *Merit Selection*, *supra* note 1.

5. See *id.* at 691.

6. See *id.* at 679.

Lawyers as a group are more liberal than the public at large,⁷ and, I suggested, because those who select judges probably care about the decisions those judges will reach and know those decisions are correlated with the judges' own ideological preferences,⁸ these lawyer-heavy commissions might very well pick more liberal judges than the public or an elected official might have picked.⁹ Second, I thought that, even if the commissions put aside all considerations of how they hope judges will decide cases, the use of commissions might still have ideological consequences because, again, lawyers are thought to be more liberal than average, and picking judges from their lot without regard to their ideological preferences might skew judiciaries to the left so long as governors and the public do not put such considerations to the side.¹⁰ At the time I published my *Missouri Law Review* piece there was, frankly, not very good evidence that lawyers were more liberal than the general population (even though it was conventional wisdom),¹¹ but the conventional wisdom has now been bolstered by a rigorous paper by Adam Bonica, Adam Chilton, and Maya Sen.¹² They ran the *Martindale-Hubbell Law Directory* in 2012 through the databases on campaign contributions and found that "American lawyers lean to the left of the ideological spectrum."¹³

In my article, I looked at two states that used the commission method and compared the ideological preferences of the judges proposed by the commissions to the ideological preferences of the public in those

7. See *id.* at 691.

8. See *id.* at 687–88 ("This correlation has been demonstrated over many years by both political scientists and legal scholars.").

9. See *id.* at 686–90.

10. See *id.* at 690 (noting that "a method of selection that does not select for ideology may simply replicate the distribution of ideological preferences within the bar" and that if that distribution "differs from the distribution among the public, then we would still expect to see the same shift in the ideological direction of the judiciary toward the preferences of lawyers and away from the preferences of the public" (emphasis omitted)). Other scholars have now echoed my theory. See Adam Bonica & Maya Sen, *The Politics of Selecting the Bench from the Bar: The Legal Profession and Partisan Incentives to Politicize the Judiciary* 2 (Harvard Kennedy Sch., Working Paper No. RWP15-001, 2015), <http://ssrn.com/abstract=2577378> [<https://perma.cc/SZ4U-LGQK>] ("Left to a judicial selection method devoid of ideological considerations, America's courts should, after controlling for relevant demographic characteristics, closely resemble the population of attorneys from which they are drawn."); *id.* at 4 ("Under such minimal politicization, a liberal skew in the preferences of attorneys would result in a judiciary that more closely resembles the preferences of Democrats. In effect, any liberal bias in the attorney pool gives Democrats an advantage in control over the judiciary." (emphasis omitted)).

11. See Fitzpatrick, *Merit Selection*, *supra* note 1, at 691.

12. Adam Bonica et al., *The Political Ideologies of American Lawyers*, 8 J. LEGAL ANALYSIS 277 (2016).

13. *Id.* at 292.

states.¹⁴ I found, using common proxies for ideological preferences, that the judges proposed by commissions in those states did appear to be quite a bit more to the left than the public at large was in those states.¹⁵

The study I published in the *Missouri Law Review* had several limitations. One was that the study looked at all the judges proposed by the commissions rather than the judges who ultimately took the bench.¹⁶ Another was that the study looked at only two states; I could not know whether the same findings would be found in other states that use the commission method, nor could I know whether the judges in states that use other methods would look any different.¹⁷

This study seeks to overcome some of the limitations in my *Missouri Law Review* piece. It is a systematic investigation of the ideological preferences of appellate judges in all fifty states over a twenty-year period (1990–2010). The goal of this study is to assess whether certain methods of selection have resulted in judiciaries that skew to the left or right compared with the public at large in those states. My main hypothesis is that the commission method and nonpartisan elections will show a leftward skew in the judiciary, but the other methods will show no skew. I include in these other “no-skew” methods the commission method where the commission serves only at the pleasure of the governor; I predict this method will behave more like gubernatorial appointment because the governor can eliminate the commission at any time. I explained above why I think the nongubernatorial commission states will skew left. I predict nonpartisan elections will skew left for one of the same reasons: because nonpartisan elections remove identifiers on the ballot, the public will be unable to select for ideology very effectively, leaving them to pick from a lot of candidates (lawyers) who are already left-leaning. As in my study in the *Missouri Law Review*, I seek to assess the ideological preferences of state appellate judges here by using a common proxy for these preferences: whether the judge exhibits more affiliation with the Republican or Democratic Party. In particular, I examine whether a judge gave more campaign contributions to Democratic or Republican

14. The states examined were Missouri and Tennessee. See Fitzpatrick, *Merit Selection*, *supra* note 1, at 692.

15. See *id.* at 693–94, 696 (finding that “although 67% of the merit nominees in Tennessee . . . voted more often in Democratic Party primaries, only 51% of the votes for the state House and only 49% of the votes for Tennessee’s federal House seats were for Democratic candidates,” and that “87% [of nominees in Missouri] gave more [campaign contributions] to Democrats than Republicans [even though] Democratic candidates in Missouri only received roughly 50% of the general election votes in state and federal House races”).

16. See *id.* at 701.

17. See *id.* at 700–01.

candidates for public office, whether the judge was registered to vote as a Democrat or a Republican, and whether the judge voted more often in Democratic primaries or Republican primaries.¹⁸ My findings are these:

- In all three judicial selection taxonomies examined in this study, the ideological skew was smaller (or even nonexistent) in states that use appointment or partisan elections than in states that use commissions or nonpartisan elections.
- To the extent there was ideological skew in a state, it was almost always to the left.
- The magnitude of skew in commission states appeared to vary in binary rather than continuous fashion based on the amount of control the legal profession had over the commissions in those states.
- Skew was not reduced in commission states where the commissions served at the pleasure of the governor rather than by law.
- Although it was not one of the principal inquiries in the study, judges selected by the commission and appointment methods were less likely to give campaign contributions to Democratic and Republican candidates for public office than judges selected by either partisan or nonpartisan elections.

It should be noted that it was beyond the scope of this project to test these findings for statistical significance; that will have to await further study. Nonetheless, these findings appear mostly consistent with my hypotheses. First, ideological skew was both leftward and more significant in commission and nonpartisan election states. The skew was smaller or nonexistent in states that use appointment or partisan elections. (To the extent it existed, the skew in partisan election states was often also leftward; in appointment states it was often rightward but small.) Second, ideological skew appeared to be influenced by the control exercised by the bar in commission states, but the influence did not grow as the number of seats increased; the influence was found as soon as the bar controlled *any* seats on the commission. Third, however, states with commissions that served only at the pleasure of the governor behaved more like states with commissions that served by law than (as I had predicted) like states using the gubernatorial appointment method.

18. See, e.g., Adam S. Chilton & Eric A. Posner, *An Empirical Study of Political Bias in Legal Scholarship*, 44 J. LEGAL STUD. 277, 280 (2015) (“[D]onations are a widely used proxy for ideology in empirical research.”).

In the Parts below, I describe in more detail the methodology behind this study, my results, and the conclusions I have drawn.

I. METHODOLOGY

This study compares the ideological makeup of the judiciary in each of the fifty states to the ideological makeup of the people of those states. I began with a list of appellate judges who served in each state from January 1, 1990, to December 31, 2010. Appellate judges were selected because it is thought that ideology plays a bigger role in appellate decisionmaking than it does in trial decisionmaking; this is the case because it is thought that the law is more ambiguous in the few cases that are appealed from trial courts than in all the cases that are filed there in the first instance.¹⁹ That is, I selected the judges for whom any ideological skew in the judiciary would be most relevant. I selected the time period from 1990 to 2010 because it would allow for a great deal of data to be collected in each state, yet the period would not be so long ago that the data would be hard to find. For each of the judges on the list, I then collected information on a common proxy for their ideological preferences: whether they exhibited greater affiliation with the Democratic Party (left or liberal preferences) or Republican Party (right or conservative preferences). In particular, to the extent it was available, I collected data on three sorts of affiliation with a political party: (1) whether the judge has given more campaign contributions to candidates for public office from the Democratic or Republican Party, (2) whether the judge was registered to vote as a Democrat or a Republican, and (3) whether the judge voted more often in Democratic or Republican primaries. To the extent it was available, this data was used to assign an affiliation of Democrat or Republican for each judge in each state on the list. These assignments were then used to establish the relative shares of Democratic and Republican appellate judges who served in each state from 1990 to 2010. These relative shares were then compared with the relative shares of Democrats and Republicans in the populace in each state, as measured by the relative share of the vote in state House of Representatives and federal House of Representatives elections from 1990 to 2010 that went to candidates from the Democratic and the Republican Parties. I then calculated whether there was any difference between the appellate judges and the public in each state, how large the difference was, and the average of the differences

19. See, e.g., Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 840 (2010) (reciting studies).

in the states that used the same method of selection. I describe each step of this methodology in more detail below.

A. The List of Appellate Judges in Each State

Surprisingly, one of the most difficult challenges of this project was to identify who served as an appellate judge in each of the states between January 1, 1990, and December 31, 2010. One would think the states would keep records of such important public officials, but, in fact, the recordkeeping was very uneven. Some states publish “blue books” with lists of public officials who serve each year, but many states do not, and even when they do, the books often do not contain sufficient biographical information to aid in the acquisition of the necessary party affiliation data. There is also a private directory of state (and federal) judges published every year by Forster-Long called *The American Bench*.²⁰ But we found that this source, too, was incomplete. Accordingly, we supplemented these sources with many others: the reporters of judicial opinions in many states list the judges who served during the time period covered by each volume; LexisNexis and Westlaw searches; searches on Google and other internet engines. Two teams of researchers independently compiled the judges in each state, and I combined the results into the most inclusive possible list in each state. I combined the lists from the independent teams on the belief that it was much more likely that the researchers would miss the name of someone who had served as a judge than it was that they would erroneously include the name of someone who had not served as a judge. All told, we found 3,386 appellate judges between 1990 and 2010.

B. The Ideological Preferences of the Judges

To capture the ideological preferences of each appellate judge, I collected information on a proxy for ideological preference commonly used in the legal and political science literature: whether the judge exhibited greater affiliation with the Democratic Party (left or liberal preferences) or Republican Party (right or conservative preferences).²¹ In particular, to the extent it was available, I collected data on three sorts of affiliation with a political party: (1) whether the judge has given more campaign contributions to candidates for public office from the Democratic or Republican Party, (2) whether the judge was registered

20. See *The American Bench*, FORSTER-LONG, LLC, <https://www.forster-long.com/americanbench> (last visited Oct. 3, 2017) [<https://perma.cc/FV83-K4D2>].

21. See Fitzpatrick, *Merit Selection*, *supra* note 1, at 692 (reciting studies).

to vote as a Democrat or Republican, and (3) whether the judge voted more often in Democratic or Republican primaries.

Unfortunately, the latter two measures of party affiliation—registration and primary voting—are not available in all states. Some states do not record this data, some states do not register voters by party, and in some states it was too expensive to obtain this data. Thus, the cornerstone of this study is the first measure: the campaign contributions the judges have made. In order to find contributions to federal candidates, I searched the Federal Election Commission website.²² In order to find contributions to state candidates, I searched the Follow the Money website,²³ and, when it was not comprehensive back to 1990 for a particular state,²⁴ I searched state-specific databases as well.²⁵ Because certain names are common in some states, other biographical information (such as age or city of residence) was used to confirm contributions whenever possible. I counted any contributions to candidates running for office as a member of one of the two parties, as well as contributions to organizations clearly affiliated with one of these parties.²⁶ Judges who gave more to Democratic candidates and organizations were then marked “Democrat,” and judges who gave more to Republican candidates and organizations were marked “Republican.” Where there were no contributions, the contributions were only to unaffiliated candidates or third parties, or the contributions were evenly divided between the parties, the judge was marked as “Unknown.” As I did when I compiled the lists of appellate judges, I collected the campaign contribution data with two independent teams of researchers. In the case of discrepancies between the two collections, a third researcher would double check the sources and resolve the discrepancy. If uncertainty persisted (because, for example, there was not enough biographical information to confirm whether the campaign contributor and the judge were indeed the same person), the contribution was included (a choice I see as an arbitrary one).

22. *Transaction Query by Individual Contributor*, FED. ELECTION COMMISSION, <http://www.fec.gov/finance/disclosure/norindsea.shtml> (last visited Oct. 5, 2017) [<https://perma.cc/53N7-7FLX>].

23. FOLLOW THE MONEY, <http://www.followthemoney.org/> (last visited Oct. 5, 2017) [<https://perma.cc/H4SR-HJZY>].

24. *Id.*

25. *Sites for State Races: Data Sources, Specific State Sites*, CAMPAIGN FIN. INFO. CTR., <http://www.campaignfinance.org/linksstate.html> (last visited Oct. 5, 2017) [<https://perma.cc/UK25-K7B5>].

26. Examples of these organizations include the Republican and Democratic state and national executive committees.

In light of the fact that the other measures of party affiliation were not available in every state, I would have liked to stop with campaign contributions, but the number of judges with “Unknown” affiliation after tallying the campaign contributions was quite large, as I show in the Appendix. Thus, I decided to add the remaining measures of party affiliation in states where they were available.²⁷ But because this means that different party affiliation metrics are used in different states, I report my results below both ways: with only the campaign contribution data and with all three sources of data (campaign contributions, party registration, and primary voting). As I show, the results were not appreciably different.

With respect to party registration, data was available at a reasonable price in twenty-two states: Alaska, California, Colorado, Connecticut, Delaware, Florida, Idaho, Kansas, Nevada, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Vermont, and West Virginia. With respect to primary voting, data was available in one other state: Tennessee. Again, because certain names are common in some states, other biographical information about the judge (such as age, birth date, birth place, and middle name) was used to confirm his or her identity in these records whenever possible. The registration data usually only recorded for which political party the judge was currently registered, so I used only current registrations in this study. The primary data usually recorded the last several primaries in which the judge had voted, so I recorded in which party’s primary the judge voted more often. Again, all of this data was collected twice by two independent research teams, and discrepancies were resolved by a third team that reexamined the aforementioned sources. The data was overlaid on the campaign contribution data in the following way: When this data agreed with the campaign contribution data—because the judge was currently registered or had voted more often in primaries of the same party to which the judge had given more campaign contributions—then the judge’s designation as a “Democrat” or “Republican” did not change. When this data disagreed—because the judge was currently registered with or had voted more often in primaries of the other party—then the judge’s designation was changed to “Unknown.” When this data filled a gap—because the judge had been

27. This, again, is a common technique to bridge gaps in political donations. See, e.g., Chilton & Posner, *supra* note 18, at 291–92 (“One shortcoming of using political donations as a proxy for ideology is that not everyone makes campaign contributions. . . . It is likely that most nondonors have political commitments, and as a result we decided to . . . code their ideology using information available on their curriculum vitae (CVs).”).

designated “Unknown” from the campaign contribution data—then the judge’s designation was changed to that for whichever party he was currently registered or had voted in more primaries. The addition of the registration and primary data reduced the number of unknowns considerably in states where it was available.

C. The Ideological Preferences of the Public

To determine the ideological preferences of the public in each state, I gathered two sources of data: the general election returns for the federal House of Representatives and the general election returns for the state House of Representatives (or its equivalent) for each general election from January 1, 1990, to December 31, 2010. I used both federal and state returns because a given political party may be branded entirely differently at the state and federal levels within any particular state, and, for this reason, I wanted to report my results using both baselines. The federal returns were gathered from the website of the Clerk of the U.S. House of Representatives.²⁸ The state returns were usually collected from the Secretary of State’s website in each state. However, this data was incomplete because many of the state websites failed to go back as far as 1990. Thus, this data was supplemented by an academic study that had already gathered all of the same state returns.²⁹ These two sources made the state returns complete with the exception of the 1990 election in North Carolina, which is missing returns from several areas of the state. As such, the 1990 election in North Carolina was omitted from my analysis. In all the states, only the votes for Republican and Democratic candidates were recorded; the votes for other parties and independents were omitted. Again, all of this data was collected twice by two independent research teams, and discrepancies were resolved by a third team that reexamined the aforementioned sources. In each state, the percentage of the vote for each party was averaged over all the elections during this time period to arrive at the public’s ideological baselines.

28. *Election Statistics, 1920 to Present*, U.S. HOUSE OF REPRESENTATIVES, <http://history.house.gov/Institution/Election-Statistics/Election-Statistics/> (last visited Oct. 5, 2017) [<https://perma.cc/C46H-9C2R>].

29. Carl Klarner et al., *State Legislative Election Returns (1967–2010)* (Jan. 11, 2013) (Inter-university Consortium for Political and Social Research, ICPSR34297-v1) (unpublished dataset containing state house election returns), <http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/34297> [<https://perma.cc/6P8N-3ADF>].

D. Measuring Ideological Skew in the Judiciaries

In order to assess whether the judiciaries in each state were more left-leaning or right-leaning than the people in their states, I made three comparisons: (1) of the *judges* with a known party affiliation, the percentage designated Republican using only campaign contribution data to the percentage of votes the public in those states gave to Republican federal and state house candidates; (2) of the *judges* with a known party affiliation, the percentage designated Republican using all data to the percentage of votes the public in those states gave to Republican federal and state house candidates; and (3) the percentage of the *total contributions* made by judges that went to Republican candidates to the percentage of votes the public in those states gave to Republican federal and state house candidates. In each of these comparisons, the second percentage was subtracted from the first. Thus, a positive number shows rightward skew in the judiciary and a negative number leftward skew.

E. Averaging Ideological Skew over States with the Same Selection Methods

In order to compare how ideological skew varied by selection method, I averaged the skews found in the states that used the same method. Unfortunately, although the states basically use only four methods of judicial selection, there are some variations among them, and there is no generally accepted taxonomy of state selection methods.³⁰ Thus, I report my results using three different taxonomies. (See Table 1 in the Appendix, in which each state is listed along with its classification in each taxonomy.) First, I use the taxonomy created by the American Judicature Society (“AJS”).³¹ The AJS divides the states into five groups: Gubernatorial Appointment, Legislative Appointment, Merit Selection, Nonpartisan Election, and Partisan Election. (As I show in the results section, in order to test my mechanism hypothesis, I further sorted the Merit Selection states by the amount of influence the bar had over the commission.³²) The AJS

30. Further complicating matters, many judges are initially appointed to the bench on an interim basis via a selection method (often gubernatorial appointment) that is different from the method used to fill full terms. It is beyond the scope of this study to assess the significance of these differences. Over time, even judges selected differently on an interim basis become folded into the state's full-term method. As a result, I characterize states only by the method of selection used to fill full terms on the bench.

31. *Methods of Judicial Selection*, *supra* note 1.

32. See Fitzpatrick, *Merit Selection*, *supra* note 1, at 680–81, for charts on the bar's influence over the commission in each of these states.

taxonomy is perhaps the best-known taxonomy, but, in my experience, some have believed it overclassifies states as commission states. In order to provide balance, I also use a competing taxonomy created by the Federalist Society for Law & Public Policy Studies; in my experience, some have believed the Federalist Society underclassifies states as commission states. The Federalist Society also divides the states into five groups: Appointment, Nonpartisan Election, Partisan Election, Hybrid, and Missouri Plan.³³ Finally, I use my own taxonomy, which I hope observers will see as both evenhanded as well as suited to test another of my hypotheses (i.e., the one about commissions that serve at the pleasure of the Governor): Appointment, Gubernatorial Commission, Commission, Nonpartisan Elections, and Partisan Elections. My taxonomy is much like the AJS taxonomy except that (1) I combine the gubernatorial and legislative appointment states into one category (because they are all officials elected by the public) and (2) I divide the AJS's Merit Selection states into two groups: Gubernatorial Commission states, where the selection commission exists only by executive order and therefore only by the continued grace of the Governor, and Commission states, where the selection commissions exist by law.³⁴ One note: two states (Arkansas and Mississippi) changed from partisan to nonpartisan elections during the period I examined in this study; as a result, I treat these states before and after the change as separate entities (i.e., Arkansas before 2000 and Arkansas after 2000; Mississippi before 1994 and Mississippi after 1994).

II. RESULTS

Table 1 in the Appendix reports the complete results of this study organized by state. Tables 2–4 in the Appendix report those results organized by states that use the same method of judicial selection for each of the three selection taxonomies discussed above.

In order to make these results more accessible to readers, I graph some of them in Figures 1–5, below. Figure 1 depicts column 5 from Table 1 in the Appendix: the percentage of judges with known campaign contribution affiliations who lean Republican compared to the percentage of votes the electorate in each state gave to Republican federal house candidates. Figure 2 depicts column 6 from Table 1: the percentage of judges with known campaign contribution affiliations

33. Federalist Soc'y, ST. CTS. GUIDE, <http://www.statecourtsguide.com/> (last visited Oct. 5, 2017) [<https://perma.cc/R9HG-7NSG>].

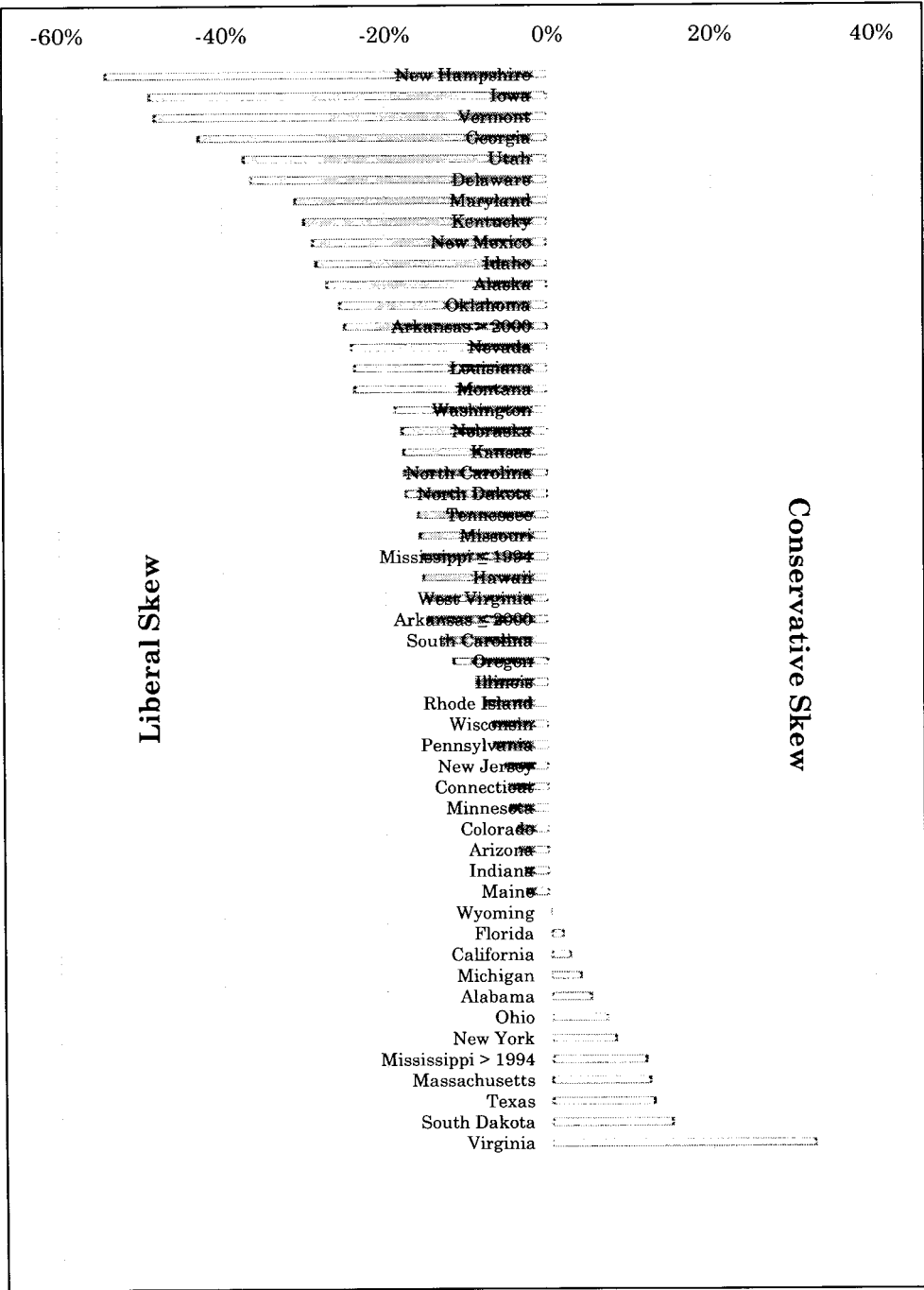
34. In the Gubernatorial Commission category, I placed Delaware, Maine, Maryland, Massachusetts, and New Hampshire. See *Methods of Judicial Selection*, *supra* note 1.

who lean Republican compared to the percentage of votes the electorate in each state gave to Republican state house candidates. In all of the figures, the electorate's percentage was subtracted from the judges' percentage. Thus, a positive number shows rightward skew in the judiciary and a negative number leftward skew. For example, the appellate judges in California have been only slightly more Republican than the public has been over the last twenty years as measured by either federal house elections (2.68% more Republican in Figure 1) or state house elections (1.27% more Republican in Figure 2).

Figures 3–5 depict columns 2 and 3 from Tables 2–4 in the Appendix: the average skew in states with the same method of judicial selection, with one figure for each judicial selection taxonomy (i.e., AJS, Federalist Society, and my taxonomy). For example, the judges in the AJS's merit selection states were on average 16% more Democrat than the public in those states as measured by their federal house votes and 14.6% more Democrat than the public as measured by their state house votes (see Figure 3).³⁵

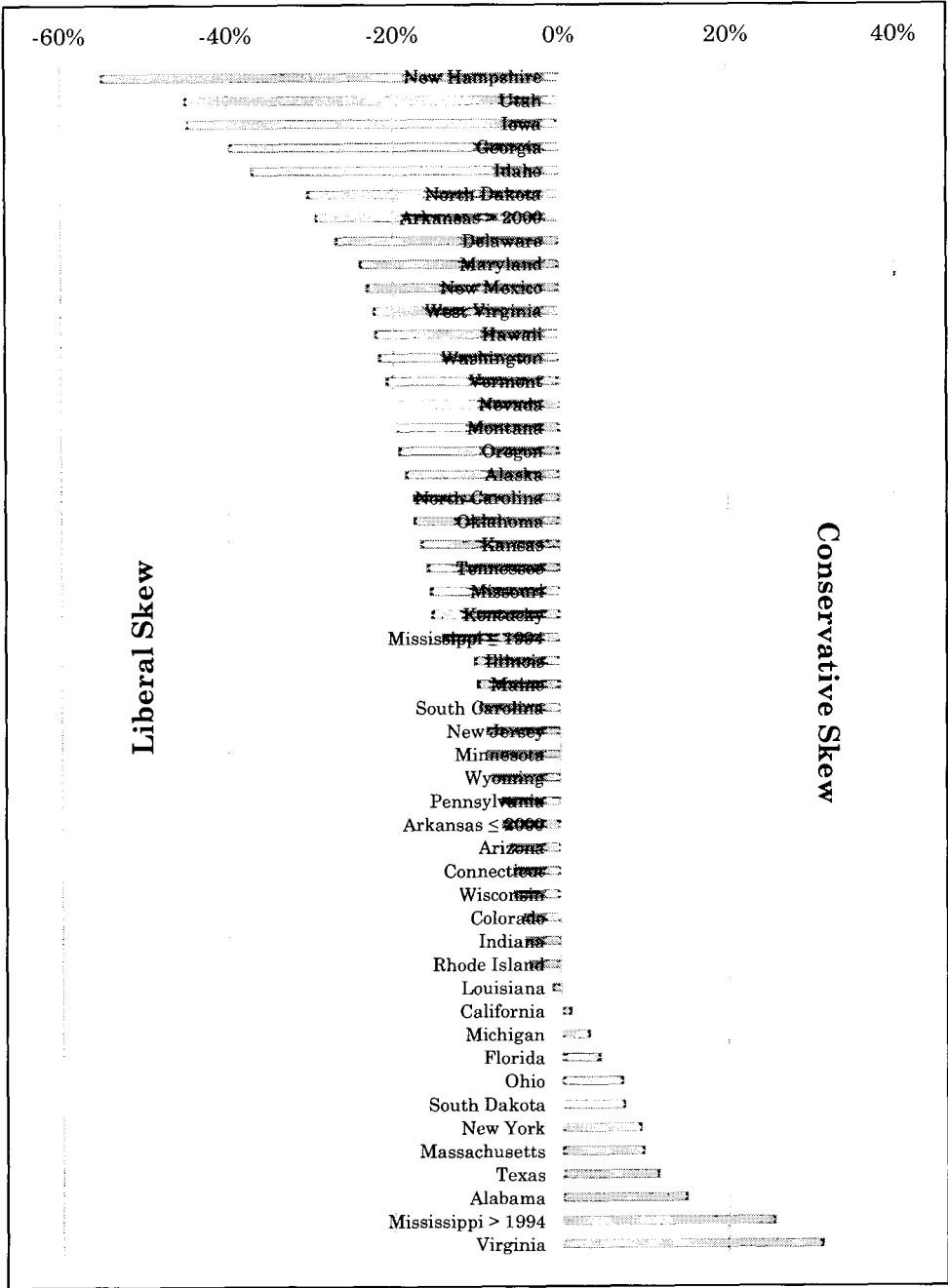
35. Note: because there are only two gubernatorial appointment and two legislative appointment states in the AJS taxonomy, I grouped all four states together into one "appointment" category.

FIGURE 1: STATE APPELLATE JUDGES VERSUS THE FEDERAL ELECTORATE IN THEIR STATE, 1990–2010



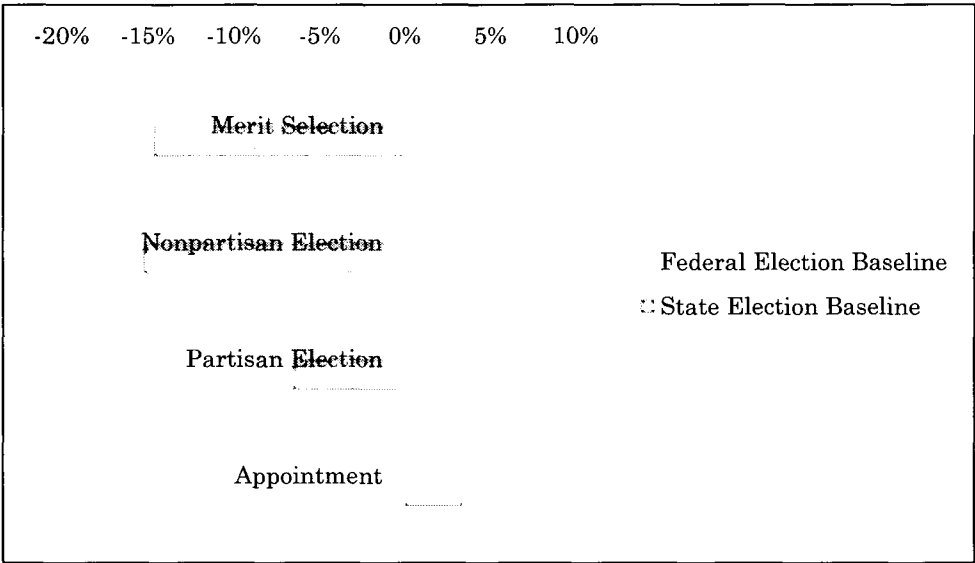
SOURCE: Campaign Contributions; Federal Election Returns.

FIGURE 2: STATE APPELLATE JUDGES VERSUS THE STATE ELECTORATE IN THEIR STATE, 1990–2010



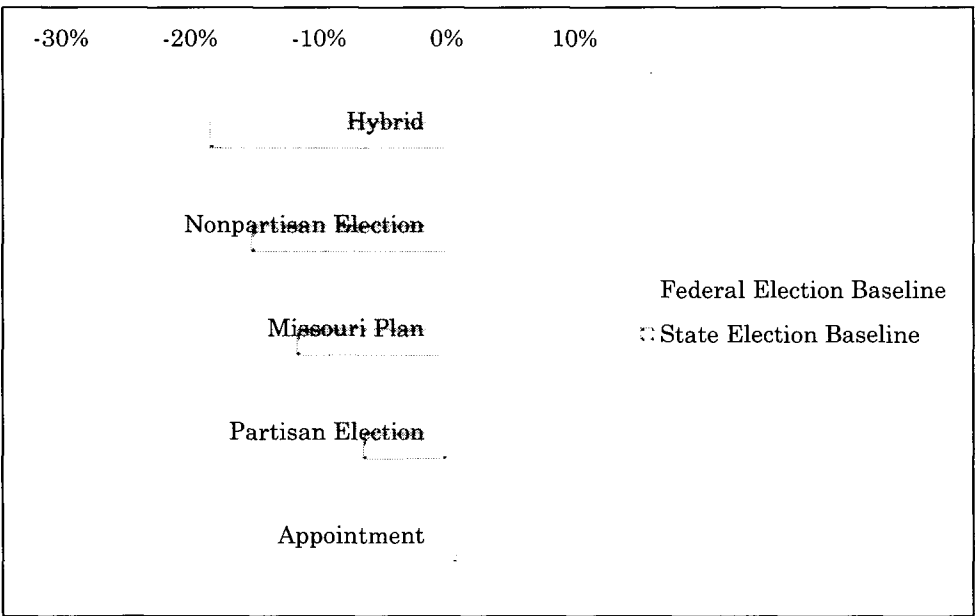
SOURCE: Campaign Contributions; State Election Returns.

FIGURE 3: STATE APPELLATE JUDGES VERSUS ELECTORATES BY AJS
SELECTION METHOD, 1990–2010



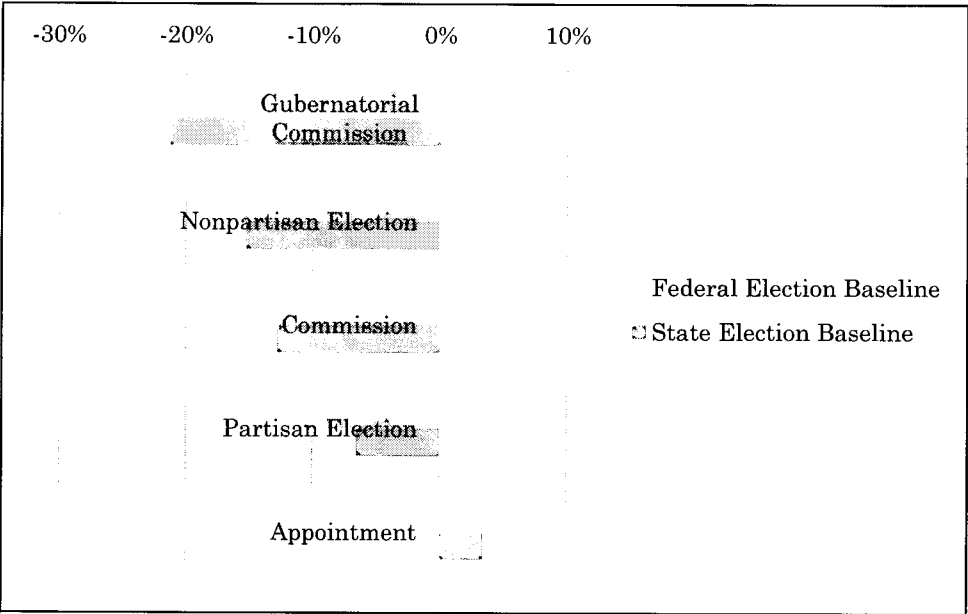
SOURCE: Campaign Contributions; State Election Returns; Federal Election Returns.

FIGURE 4: STATE APPELLATE JUDGES VERSUS ELECTORATES BY
FEDERALIST SOCIETY SELECTION METHOD, 1990–2010



SOURCE: Campaign Contributions; State Election Returns; Federal Election Returns.

FIGURE 5: STATE APPELLATE JUDGES VERSUS ELECTORATES BY FITZPATRICK SELECTION METHOD, 1990–2010



SOURCE: Campaign Contributions; State Election Returns; Federal Election Returns.

III. DISCUSSION

My results are noteworthy in several respects. First, as all of the negative numbers in Table 1 in the Appendix show, most states exhibited a leftward skew in their judiciaries. *Roughly forty states show a leftward skew* on every metric. It rarely matters whether the comparison is to federal house election returns (columns 5, 8, and 11) or state house election returns (columns 6, 9, and 12): the judiciaries in most states appear to be more liberal than the public in their states. It also rarely matters whether the comparison included only campaign contribution data (columns 5, 6, 11, and 12) or party registration and primary voting data as well (columns 8 and 9): although the number of judges with unknown affiliations often went down in states where the additional data was available, it usually did not make much of an impact on the magnitude of the ideological skew. It makes more of a difference whether the comparison is made to the percentage of judges who are designated Republican or to the percentage of their contributions that go to Republicans. The comparison that looks at the money (columns 11 and 12) as opposed to the judges is noisier—sometimes exacerbating the ideological skew I found from looking at the

judges and sometimes counteracting it. In every case, however, the vast majority of states still exhibit a leftward skew. It is true that in many states the percentage of judges with unknown affiliation is high, and, if those judges have significantly different ideological preferences than the judges with known affiliations, then the picture painted by my results would not be accurate. However, I know of no reason why the judges who did not make any campaign contributions are, for example, more likely to be right-leaning than the judges who did. Indeed, again, when the voter registration and primary voting data were collected in the states where it was available, it largely confirmed the campaign contribution data. My finding here is also consistent with the Bonica-Sen study, which found that judges were to the left of elected officials in all but four states.³⁶ Bonica and Sen also employed a statistical device to correct for the possibility that nondonors differed from donors; they concluded that their results were “substantively identical” with and without the correction, lending support to the notion that, if we could observe the nondonor population, the results would not look much different than those I present here.³⁷

Second, the leftward skews were often quite large—frequently in the double digits—whereas, in the few states with rightward skews, the skew was usually very small (with Virginia the most notable exception). Indeed, the average leftward skew was approximately *twice as large* as the average rightward skew.³⁸ This, too, is consistent with the Bonica-Sen study, which found small gaps when judges were to the right of public officials but often very large ones when judges were to the left.³⁹

Third, there may very well be a relationship between the method of selection and ideological skew. As Figures 3–5 and Tables 2–4 in the Appendix show, *in every taxonomy*, the skew was larger and more to the left in states that use the commission method (referred to as “Merit Selection,” “Missouri Plan,” or the “Commission Method” in the various

36. See Bonica & Sen, *supra* note 10, at 23 fig.6 (comparing ideology of judges, politicians, and attorneys). The Bonica-Sen study relied exclusively on the *Martindale-Hubbell Law Directory* to find judges.

37. See *id.* at 10–12 (employing a Heckman correction).

38. Based only on contribution data, the average rightward skew was 9.51% against the federal electorate and 11.64% against the state electorate, whereas the average leftward skews were 20.21% and 18.45%, respectively. Based on contribution, registration, and primary voting data, the corresponding average rightward skews were 9.66% and 11.98%, whereas the average leftward skews were 19.52% and 17.82%. Based on the data for magnitude of contributions, the corresponding average rightward skews were 13.07% and 17.38%, whereas the average leftward skews were 30.19% and 25.87%.

39. See Bonica & Sen, *supra* note 10, at 23 fig.6 (comparing ideology of judges, politicians, and attorneys).

taxonomies) and nonpartisan elections than in states that used appointment and partisan elections. Although there is some skew in the other states as well, it is smaller or even nonexistent in some taxonomies. This is consistent with my hypothesis that commission and nonpartisan election states would show a leftward skew that appointment and partisan election states do not. Again, my results here are consistent with the Bonica-Sen study, which found that judges selected by the commission method or nonpartisan elections more closely reflected the ideological makeup of the lawyer population than judges selected by appointment or partisan elections.⁴⁰ It is surprising to me, however, that partisan-election states exhibited a larger (and a left-leaning) skew than the appointment states. My best hypothesis for this result is that, in many partisan-election states, interim vacancies are filled with the commission method. Thus, many of the judges on the appellate benches in partisan-election states got there through the commission method, not partisan elections (though they might eventually retain their seats in partisan elections). This might explain why the partisan-election skew falls in between zero skew and the leftward skew exhibited in commission states.

Fourth, as Table 2 in the Appendix shows, there does appear to be a relationship between the amount of influence the bar exhibits and the magnitude of the leftward skew, but the relationship is binary as opposed to continuous. That is, the leftward skew increased based on whether or not there were *any* bar seats on the commissions; the skew did not continue to grow as the number of such seats increased. As such, this is only somewhat consistent with my hypothesis that, the greater the bar's control of the commission, the more liberal the judges in those states would be. It may be the case that the bar's representatives on these commissions are so persuasive that one is all the bar needs to exert its influence. (The amount of bar influence did have a more continuous effect on the magnitude of leftward skew as measured by total campaign contributions.)

Fifth, as Figure 5 and Table 4 in the Appendix show, the leftward skew in commission states was not reduced when the commissions served only at the pleasure of the governor (in fact, it was somewhat increased). I had predicted that these commission states would behave more like gubernatorial appointment states because, if the governor did not like the commission in his or her state, he or she could simply eliminate it. But this was not the case. It may be that, even when a commission is established only by executive order, political

40. See *id.* at 24–27.

norms make it just as difficult to revoke the commission as one created by law.

Finally, it should be noted that judges in states that use partisan and nonpartisan elections tend to make campaign contributions more often than judges in states that use other methods. As Table 1 in the Appendix shows, the number of judges who did not make campaign contributions averaged 60% in commission and appointment states, but dropped to 40% and 30% in nonpartisan- and partisan-election states, respectively. Part of the explanation for this may be that some of the commission states prohibit such contributions in their codes of judicial ethics. But, regardless, this finding may be of interest to commentators who seek methods of selection that minimize the amount of politicking in the judiciary.⁴¹

It should be emphasized that this study has a number of limitations. First, as I noted, it was beyond the scope of this study to bring to bear statistical tools to test the significance of the differences I find here. Thus, it is possible that none of the differences I report are statistically significant. Second, in many states, many of the judges' ideological affiliations are unknown due to lack of data. Although there is no reason to think the unknown judges have different ideological preferences than the known judges, if they are significantly different, then the results I found here would not be accurate. It should be noted, however, that neither of these limitations is found in the Bonica-Sen study, and, as I have said, that study found similar results to this one.

CONCLUSION

In this study I have tried to shed light on an unexplored question in the vast literature on judicial selection: do some methods more than others lead to an ideological dissonance between the judiciary and the public? I hypothesized that two methods of selection—technocratic commissions (when the commissions did not serve at the pleasure of the governor) and nonpartisan elections—would exhibit a leftward skew that the other methods—appointment by elected officials, gubernatorial commissions, and partisan elections—would not. My results are mostly consistent with this hypothesis, with the major exception of my prediction about states with commissions that serve at the pleasure of the governor: these states were just as skewed to the left as other commission states (if not more so). I also hypothesized two possible mechanisms for this skew: (1) the control that the left-leaning legal

41. See Fitzpatrick, *Merit Selection*, *supra* note 1, at 685 n.32 (discussing these commentators).

profession has over the commissions in many states and (2) the barriers that the commission method and nonpartisan elections place in the path of filtering the left-leaning pool of candidates for judicial office (lawyers) by ideology. My results are consistent with these mechanisms, but it appears that the first mechanism may not depend on the bar exhibiting majority control over commissions; rather, it may be that reserving even one seat for the bar leads to the same leftward influence as reserving several seats.

APPENDIX

Table 1 reports the complete results of this study organized by state. Reading left to right, the Table lists each state, how the state is classified in each of the three selection taxonomies (designated "AJS" for American Judicature Society, "FS" for the Federalist Society, and "BF" for my own), and then the three different measures of ideological skew in the judiciary in that state. Again, the first measure (columns 5–7) compares the percentage of judges in each state from 1990–2010 who were designated as Republican as opposed to Democrat based on the campaign contribution data with the percentage of the vote Republican as opposed to Democratic candidates took from the public in house races over the same time period. Column 5 subtracts the percentage of Republican votes in federal races from the percentage of judges who are designated Republican; a positive differential means the judges leaned more Republican than the public did, and a negative differential means the judges leaned more Democrat than the public did. Column 6 is the same calculation but uses state house races instead of federal house races. Column 7 is the percentage of judges in each state who were excluded from the calculations in columns 5 and 6 because no party affiliation could be designated for them (because, for example, they gave no campaign contributions or gave contributions in equal amounts to candidates of both parties). For example, the appellate judges in California have been only slightly more Republican than the public has been over the last twenty years as measured by federal house elections—a mere 2.68%—but some 46.58% of judges have no known affiliation based on campaign contributions alone.

The second measure (columns 8–10) is the same as the first, except the percentage of judges who were designated as Republican as opposed to Democrat is based not only on campaign contribution data, but, in the states included in these columns, party registration and primary voting data as well. (The states left blank in the second measure did not make available party registration or primary voting data.) As is evident from column 10, including these other data sources reduced the percentage of judges with unknown party affiliation considerably. For example, the percentage of judges in New Jersey with unknown affiliation went from 71.79% to 21.37% after these other data sources were added to the campaign contribution data.

The third measure (columns 11 and 12) is the same as the first except that, instead of using the percentage of *judges* who were Republican or Democrat, I used the percentage of the judges' *campaign contributions* that went to Republicans as opposed to Democrats. In some states, looking at the relative magnitude of the contributions

results in a significantly different skew than looking at the number of judges who gave more money to one party than the other. For example, the leftward skew in South Carolina was only 9.85% (versus the state electorate) and 13.16% (versus the federal electorate) when the comparison is with how many judges have given more to one party or the other; it increases to 32.30% (for state elections) and 35.61% (for federal elections) when the comparison is with how much money judges have given to one party or the other.

Tables 2–4 show the average of all three measures of skew across the states that use the same method of judicial selection, with one table for each judicial selection taxonomy. In particular, Table 2 uses the AJS taxonomy, Table 3 uses the Federalist Society taxonomy, and Table 4 uses my taxonomy.

TABLE 1: IDEOLOGICAL SKEW AMONG APPELLATE JUDGES BY STATE

				R Advantage by Judicial Affiliation							
	Selection Taxonomy			Campaign Contributions Only			Campaign Contributions, Registration, and Primary Voting			R Advantage by Contribution Amount	
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)
State	AJS	FS	BF	Federal Elections	State Elections	% Unknown	Federal Elections	State Elections	% Unknown	Federal Elections	State Elections
CA	GA	A	A	2.68%	1.27%	46.58%	10.15%	8.74%	35.90%	5.80%	4.39%
NJ	GA	A	A	-5.60%	-9.08%	71.79%	-5.63%	-9.11%	21.37%	2.36%	-1.13%
SC	LA	A	A	-13.16%	-9.85%	68.57%	2.10%	5.41%	20.00%	-35.61%	-32.30%
VA	LA	A	A	32.68%	31.32%	70.59%	—	—	—	37.50%	36.13%
AK	MS	MP	C	-27.29%	-18.67%	55.56%	-23.12%	-14.50%	33.33%	-17.67%	-9.05%
AZ	MS	MP	C	-3.90%	-6.37%	29.17%	—	—	—	-28.61%	-31.08%
CO	MS	MP	C	-4.13%	-4.58%	51.61%	-12.13%	-12.58%	19.35%	-29.56%	-30.00%
CT	MS	H	C	-5.15%	-5.79%	78.95%	-4.96%	-5.60%	24.56%	-23.05%	-23.70%
DE	MS	H	GC	-36.52%	-26.93%	63.64%	-17.07%	-7.48%	18.18%	-16.21%	-6.62%
FL	MS	MP	C	1.75%	4.79%	62.35%	-4.79%	-1.76%	37.65%	10.79%	13.82%
HI	MS	H	C	-15.56%	-22.28%	55.56%	—	—	—	5.62%	-1.10%
IN	MS	MP	C	-3.23%	-4.36%	71.43%	—	—	—	25.57%	24.44%
IA	MS	MP	C	-48.95%	-44.80%	61.90%	—	—	—	-44.09%	-39.95%
KS	MS	MP	C	-17.89%	-16.86%	69.57%	-21.86%	-20.83%	60.87%	-48.76%	-47.73%
ME	MS	A	GC	-3.09%	-10.15%	50.00%	—	—	—	6.45%	-0.61%
MD	MS	H	GC	-31.23%	-24.17%	54.39%	—	—	—	-30.72%	-23.66%
MA	MS	H	GC	12.36%	9.98%	64.18%	—	—	—	12.26%	9.89%
MO	MS	MP	C	-15.97%	-15.78%	53.92%	—	—	—	-42.71%	-42.53%
NE	MS	MP	C	-18.07%	—	85.19%	—	—	—	-10.90%	—
NH	MS	H	GC	-54.42%	-55.16%	64.29%	—	—	—	-52.85%	-53.59%
NY	MS	H	C	8.18%	9.59%	58.62%	3.50%	4.91%	20.11%	17.69%	19.10%
OK	MS	MP	C	-25.74%	-17.69%	79.31%	-37.33%	-29.29%	20.69%	10.91%	18.95%
RI	MS	H	C	-7.87%	-3.92%	73.33%	7.13%	11.08%	66.67%	-10.05%	-6.10%
SD	MS	MP	C	15.14%	7.64%	75.00%	—	—	—	25.46%	17.95%
TN	MS	MP	C	-16.17%	-16.08%	25.00%	-16.92%	-16.82%	19.12%	-21.56%	-21.47%
UT	MS	H	C	-37.49%	-45.06%	62.96%	-19.99%	-27.56%	40.74%	-33.13%	-40.70%
VT	MS	H	C	-48.30%	-20.89%	63.64%	-33.30%	-5.89%	54.55%	-73.10%	-45.69%
WY	MS	MP	C	0.23%	-8.34%	58.33%	—	—	—	-29.03%	-37.60%
AR > 2000	NE	NE	NE	-25.19%	-29.37%	33.33%	—	—	—	-40.84%	-45.01%
GA	NE	NE	NE	-43.01%	-39.73%	44.68%	—	—	—	-42.49%	-39.21%
ID	NE	NE	NE	-28.63%	-37.02%	40.74%	-28.63%	-37.02%	40.74%	-28.07%	-36.46%
KY	NE	NE	NE	-30.14%	-15.56%	45.95%	—	—	—	-26.19%	-11.61%
MI	NE	NE	NE	3.95%	3.54%	12.16%	—	—	—	5.64%	5.23%
MN	NE	NE	NE	-5.02%	-8.98%	59.68%	—	—	—	-26.36%	-30.33%
MS> 1994	NE	NE	NE	11.93%	25.66%	63.16%	—	—	—	16.36%	30.09%

SOURCE: Campaign Contributions; Party Registration; Primary Voting Records; State Election Returns; Federal Election Returns.

TABLE 2: IDEOLOGICAL SKEW AMONG APPELLATE JUDGES BY AJS
SELECTION METHODS

	R Advantage by Judicial Affiliation						R Advantage by Contribution Amount	
	Campaign Contributions Only			Campaign Contributions, Registration, and Primary Voting				
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
Selection Taxonomy	Federal Elections	State Elections	Unknown %	Federal Elections	State Elections	Unknown %	Federal Elections	State Elections
Gubernatorial Appointment	-1.46%	-3.90%	59.19%	2.26%	-0.19%	28.63%	4.08%	1.63%
Legislative Appointment	9.76%	10.73%	69.58%	17.39%	18.36%	45.29%	0.94%	1.92%
Merit Selection	-15.97%	-14.60%	61.16%	-14.48%	-13.05%	47.47%	-16.55%	-15.52%
Merit Selection: No Bar Seats ⁴²	-7.73%	-8.58%	63.00%	-7.37%	-8.22%	44.17%	-11.30%	-12.14%
Merit Selection: Any Bar Seats ⁴³	-19.36%	-17.24%	60.41%	-17.41%	-15.16%	48.82%	-18.71%	-17.00%
Merit Selection: Bar Seats Greater than Zero but Fewer than Majority ⁴⁴	-19.67%	-17.35%	62.16%	-17.14%	-14.64%	50.00%	-16.52%	-14.49%
Merit Selection: Majority Bar Seats ⁴⁵	-17.03%	-16.47%	47.28%	-19.39%	-18.83%	39.99%	-35.16%	-34.60%
Nonpartisan Election	-15.38%	-15.24%	39.61%	-15.70%	-15.56%	36.71%	-24.54%	-24.40%
Partisan Election	-10.77%	-6.57%	34.18%	-10.21%	-6.01%	28.55%	-8.79%	-4.59%

SOURCE: Campaign Contributions; Party Registration; Primary Voting Records; State Election Returns; Federal Election Returns.

42. The states in this category are Colorado, Connecticut, Maine, Massachusetts, New Hampshire, New York, and Rhode Island.

43. The states in this category are Alaska (3/7 bar selected), Arizona (5/16 bar selected), Delaware (1/9 bar selected), Florida (4/9 bar selected), Hawaii (2/9 bar selected), Indiana (3/7 bar selected), Iowa (7/15 bar selected), Kansas (5/9 bar selected), Maryland (5/17 bar selected), Missouri (3/7 bar selected), Nebraska (4/9 bar selected), Oklahoma (6/13 bar selected), South Dakota (3/7 bar selected), Tennessee (12/17 bar selected), Utah (2/7 bar selected), Vermont (3/11 bar selected), and Wyoming (3/7 bar selected). See Fitzpatrick, *Merit Selection*, *supra* note 1, at 680–81.

44. The states in this category are Alaska (3/7 bar selected), Arizona (5/16 bar selected), Delaware (1/9 bar selected), Florida (4/9 bar selected), Hawaii (2/9 bar selected), Indiana (3/7 bar selected), Iowa (7/15 bar selected), Maryland (5/17 bar selected), Missouri (3/7 bar selected), Nebraska (4/9 bar selected), Oklahoma (6/13 bar selected), South Dakota (3/7 bar selected), Utah (2/7 bar selected), Vermont (3/11 bar selected), and Wyoming (3/7 bar selected). See *id.*

45. The states in this category are Kansas (5/9 bar selected) and Tennessee (12/17 bar selected). See *id.*

TABLE 3: IDEOLOGICAL SKEW AMONG APPELLATE JUDGES BY
FEDERALIST SOCIETY SELECTION METHODS

	R Advantage by Judicial Affiliation						R Advantage by Contribution Amount	
	Campaign Contributions Only			Campaign Contributions, Registration, and Primary Voting				
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
Selection Taxonomy	Federal Elections	State Elections	% Unknown	Federal Elections	State Elections	% Unknown	Federal Elections	State Elections
Appointment	2.70%	0.70%	61.51%	7.24%	5.24%	39.57%	3.30%	1.30%
Hybrid	-21.60%	-18.46%	63.95%	-15.35%	-12.22%	46.32%	-20.35%	-17.22%
Missouri Plan	-12.63%	-11.76%	59.87%	-14.68%	-13.98%	48.15%	-15.40%	-15.35%
Nonpartisan Election	-15.38%	-15.24%	39.61%	-15.70%	-15.56%	36.71%	-24.54%	-24.40%
Partisan Election	-10.77%	-6.57%	34.18%	-10.21%	-6.01%	28.55%	-8.79%	-4.59%

SOURCE: Campaign Contributions; Party Registration; Primary Voting Records; State Election Returns; Federal Election Returns.

TABLE 4: IDEOLOGICAL SKEW AMONG APPELLATE JUDGES BY
FITZPATRICK SELECTION METHODS

	R Advantage by Judicial Affiliation						R Advantage by Contribution Amount	
	Campaign Contributions Only			Campaign Contributions, Registration, and Primary Voting				
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
Selection Taxonomy	Federal Elections	State Elections	% Unknown	Federal Elections	State Elections	% Unknown	Federal Elections	State Elections
Appointment	4.15%	3.41%	64.38%	9.83%	9.09%	36.96%	2.51%	1.77%
Gubernatorial Commission	-22.58%	-21.29%	59.30%	-18.69%	-17.40%	50.21%	-16.21%	-14.92%
Commission	-14.23%	-12.75%	61.65%	-13.37%	-11.84%	46.74%	-16.64%	-15.69%
Nonpartisan Election	-15.38%	-15.24%	39.61%	-15.70%	-15.56%	36.71%	-24.54%	-24.40%
Partisan Election	-10.77%	-6.57%	34.18%	-10.21%	-6.01%	28.55%	-8.79%	-4.59%

SOURCE: Campaign Contributions; Party Registration; Primary Voting Records; State Election Returns; Federal Election Returns.